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## CONVERGENCE OF THE COMMON LAW - CIVIL LAW

### THE SCOTTISH EXPERIENCE

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#### Historical Background

The Legal System in Scotland was specifically guaranteed a separate existence within the United Kingdom under a clause in the Act of Union with England in 1707. By this time the law in Scotland had become heavily influenced in its main areas by the developing *ius commune* of continental Europe. Recent doctrinal legal historical research is beginning to reveal that this had had direct impact on the case law by being cited in Scottish courts,<sup>1</sup> and the Scottish solution, can very often be shown to be the adoption of one of several views that were current and hotly debated in contemporary or earlier Europe. However, as will become more apparent later in this paper, it is not the comparison of precise legal rules or the borrowing

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<sup>1</sup> For particular detailed examples see e.g. G Lubbe, 'The formation of Contract' in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland*, Vol 2 – Obligations 1 –44 and J W g Blackie, 'Defamation' in *ibid* 633 – 709.

and convergence of rules that should be emphasised, but rather a particular way of considering legal questions, a converged way.

Accordingly, the important part of the historical background as influencing the mixed experience of the Scottish legal tradition is that it contained from early on works of authority by jurists that draw on continental as well as native Scottish, and then also English experience. The first, and still sometimes referred to, treatise, dealing with virtually the whole of the Law (Stair, *Institutions*) had been published in the generation immediately before the Act of Union in 1707. The next work of this type (Bankton, *Institute*) was written in the following generation in parts much under the influence of the famous Dutch jurist, Johannes Voet. The result was that rules of a civilian origin were embedded (more often than no in a hidden way) in treatments that the courts thereafter went back to over and over again for major points of private law. From around the middle of the eighteenth century engagement with doctrine of English law commenced, and ever since there has been a highly complex picture where interest in and use of English doctrines has

occurred along with the continued civilian tradition. In civil matters, not criminal, the highest court is the same court as it is for England, Wales and Northern Ireland, the House of Lords. There are traditionally two Scottish qualified judges there, occasionally, three. As the bench virtually always sits with a majority of English qualified judges it used to be suggested by commentators<sup>2</sup> that decisions of that court in Scottish cases had severely affected the integrity of the civilian tradition and resulted not so much in convergence as annexation by the English tradition. That thesis cannot be supported. There are some examples where there clearly has been misunderstanding.<sup>3</sup>

## **Modes of Thinking**

What I should like to emphasise, as a main theme, focussing on the position in contemporary Scotland, is not the fact that particular rules have a civil law background, nor that particular rules have an

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<sup>2</sup> In particular D M Walker, whose *The Scottish Legal System* remains the only large scale work on the nature of the legal system.

<sup>3</sup> A recent one is the case of *Sharp v Thomson* where alien ideas akin to those in English equity jurisprudence were used to hold that a buyer of immoveable property, who was not yet the owner, as having not yet registered his or her title, nonetheless was not affected by security in the form of a floating charge over the property of the bankrupt seller.

English background. Rather what is important is that there is a particular way of thinking that has developed from this earlier experience. That way of thinking is to think more from first principles in the field of law in question, rather than to at first look for an already decided case. Associated with this is a tendency to carry on the analysis in that way, referring certainly to the cases, but not seeing them as a large collection of dicta of judges that have to be reconciled or exploited for their, often subtle, differences, which is a strong mark of the English common law technique. It is not that this does not happen, what I am talking about is a tendency. I explore this in some more detail below. However, one example may make this clearer. In commercial contracts a common problem for courts is how to deal with breach of contract by one party when the other party still has not entirely performed their side of the contract, as for example in a building contract where the work is done in stages, or in a commercial agency contract where the principal has to supply goods and information for the agent to get business. In all the recent Scottish decisions the court has started by emphasising the principle of ``mutuality'' underlying contract law and then

determining on the facts what in the particular contract were the counterpart obligations of each aspect of the contract.<sup>4</sup>

### **When can you borrow other people's case law?**

The experience of a mixed legal system, at least that of Scotland, which has developed in very close proximity to English law, as has that of South Africa, is that taking guidance from the case law of the common law world, can be done from a background of civilian rules and also the distinct way of thinking from first principles, that is outlined above. The experience of Scotland over the last century and more, I believe, shows both the advantages and the pitfalls that are entailed by such a development. It also shows that there are certain features of a legal system, which probably are quite deeply embedded, that result in certain areas of law as quite resistant to such a development. To take this last point first: It is well known to comparative lawyers and legal policy makers that the law of immoveable property is typically very resistant to influence from other

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<sup>4</sup> For a detailed study of the interaction of civilian and English common law in the Scots law of contract, See H. L. MacQueen, 'Scots and English Common Law; The Case of Contract' (2001) 54 Current Legal Problems 205.

systems of law. The Scottish experience shows that the law of succession on death is likewise resistant. But it is not so obvious why that should be so. One can contrast the law relating to interpretation of terms of contracts and the law relating to interpretation of terms of wills. In interpreting terms of contracts the courts in Scotland frequently use English material, though one can discern occasionally some civilian maxim, such as the approach to construing ambiguities where they restrict freedom *contra proferentem*, as in an exemption from liability clause. Cases on interpreting wills virtually never refer to English material, even though the approach in both countries is in essence the same. In interpreting contracts the latest English fashions are picked up eagerly and quickly. A prominent example is the "factual matrix" i.e. contextual, approach to interpretation of contracts associated with Lord Hoffmann.<sup>5</sup>

### **Convergence Driven by a Perception of Common Economic and Social Change**

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<sup>5</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.

## *Generally*

One trend that is promoting convergence between civil law traditions and the English tradition at present is that Courts, and jurists are increasingly aware that a developing relatively globalised economy and society is throwing up new challenges and it is seen as appropriate for the law to respond to these either in the same way in different jurisdictions, or, if that cannot be achieved, at least in the light of consideration of the same factors. The difficult questions that medical technologies pose for the law are a fairly obvious example of this. Examples of this can be found in courts in a variety of jurisdictions, now dating back into the 1980s. The German Supreme Court made use of English material in a decision in a "wrongful life" claim as long ago now as 1986.<sup>6</sup> This tendency to convergence when faced with what are seen as new social and economic phenomena does not necessarily result in there being a common outcome in all jurisdictions. It has not, for example, in the field of wrongful life claims. However, there is a tendency to strive for that. A particularly marked example in the Scottish

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<sup>6</sup> BGHZ 86,240.



experience, in a House of Lords case as it happens<sup>7</sup> is the finding that a woman, guaranteeing her husband's business debts to a bank is entitled to avoid the contract of guarantee<sup>8</sup> with the bank, on the ground that the relationship with her husband was a form of misrepresentation by a third party giving rise to this right. It is fairly clear that on the authorities this was not part of the Law of Scotland. But convergence was achieved not by crude annexation through simply relying on English case law. Rather, it was, in the most influential judgement, recast in what sounds like a civil law mode, by reference to a requirement on the part of the bank of ``good faith'', and supporting that by reference to a number of Scottish decisions which were nothing to do with good faith in creation of contracts, but were to do with good faith controlling the acquisition of property rights. Such property rights cases deal with situations such as that where the owner of something has entered into a binding contract to sell it to someone and then before the date for performing that contract arrives sells it to someone else and makes that person the owner, in a situation where

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<sup>7</sup> *Smith v Bank of Scotland* 997 SC (HL) 111.

<sup>8</sup> Reflecting the civilian tradition, the Scottish legal word is "caution".

that person knew or turned a blind eye to the existence of the first contract.<sup>9</sup>

### *Human Rights*

An overarching legal order as Human Rights law under the European Convention of Human Rights has in the short period that it has been embedded in the laws of the United Kingdom jurisdictions shown that it can play a role in the experience of convergence. This is a distinctive feature, the relative importance of which, it may be predicted, will grow greater in this. What is obviously distinctive about it is that it is set of ideas and doctrines, but, even more crucially, a way of looking at issues and disputes that arises from within neither the civilian tradition as such nor, of course, from the English tradition. It is clear that it draws on a much wider worldwide movement. It happens that owing to the coming about of Scottish political devolution before the Human Rights Act 1998 came into force, and the effect of a specific clause in the legislation that created

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<sup>9</sup> Known to Scots lawyers as “of-side goals” cases, reflecting a footballing metaphor in the judgements in the leading case, *Rodger (Builders) v Fawdry* 1950 SC 483.

the new constitutional arrangements in Scotland<sup>10</sup> that the first Human Rights cases in the United Kingdom were cases in Scotland. They in turn have been influential in the development of the human rights jurisprudence of the English courts as well.<sup>11</sup> More important for the experience of convergence than the fact that the same issues and the same rules become prominent may be that a common way of thinking is increasingly fostered. This may be more marked for England than for Scotland, since, as suggested above Scots lawyers can be shown, to have a tendency to think more from first principles, than from looking for a case. Human Rights law always starts from a principle, in this case in the European Convention.

One area where this may prove to have affected the mode of thinking is those aspects of the law where private law<sup>12</sup> gives protection to ``privacy''. A series of cases in England in the last year,<sup>13</sup> considering Article 8 (private and family life) and Article 10 (Freedom of expression) have developed

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<sup>10</sup> Scotland Act 1998.

<sup>11</sup> For example in the field of Mental Health law the case of *X v Scottish Ministers* which held that the first ever statute of the Scottish Parliament, an Act which in effect meant that people who had been sent to mental hospital by a criminal court, but turned out not to be treatable, could be detained in hospital.

<sup>12</sup> As opposed to a statutory regime such as the protection from harassment legislation

<sup>13</sup> Most recently *Campbell v MGN Ltd* [2002] EWCA 1373.

the native common law of breach of confidence to cover classic inappropriate media intrusion. There has been no Scottish case so far on the topic, though there are dicta in a range of Scottish decisions from before the European Convention being incorporated into the domestic law, that Scots law does give "protection of privacy". It can be predicted if such a case does emerge, that the court may well not proceed solely as the English have in developing "breach of confidence". That concept is part of Scots law, having been independently created, without direct reference to English law, by Scottish judges from the early nineteenth century onwards, to deal firstly with lawyer/client confidentiality, and, then, to do deal with medical confidentiality, and later trade secret confidentiality. But much of the conceptualisation will be very similar to that adopted recently in the confidentiality cases.

### **When convergence is taking a cross bearing**

I have emphasised some factors from a Scottish perspective within the United Kingdom and more widely which do seem to be driving some convergence. However, one should not assume always

that because there is an interest in material from another legal tradition, and, indeed, direct reference to it that that is evidence of genuine convergence. If the background of the particular system is relatively resistant to outside influence, which seems to be the case with English law, but much less with Scots law, and especially given the casuistic technique adopted by English law it can be that use of material is a basic way of checking in a situation where the law is faced with a real difficulty that the solution locally is not out of line with the thinking of other parts of the world. Professor Sejf van Erp discusses a very recent prominent example of this in an English case in the House of Lords in detail in his essay in this collection.<sup>14</sup> The importance of this type of development is, clearly, of great significance for understanding convergence now and as it will develop. It is a different phenomenon from the purely ornamental references to foreign systems that in the past can be found on occasions in Scottish material.<sup>15</sup>

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<sup>14</sup> **EDITOR PLEASE ADD A CROSS REFERENCE TO THIS**

<sup>15</sup> For these see E Örüçü, 'Comparative Law as a Toll of Construction the Scottish Courts' (1999) 4 *Juridical Review* 27 and J. W. G. Blackie, 'Old and Foreign: History, Historiography and Comparative Law' in Lindsay Farmer and Scott Veitch (eds), *The State of Scots Law* (2001).

## **Potential Dangers**

It is perhaps, however, worth noting that Scottish experience shows that it can happen that there can be a complete misunderstanding of the other system's approach, if the court is not sufficiently informed about the position in that other system. Amongst many successful uses of British Commonwealth material by Scottish courts can be found a few instances where it has been misunderstood, through using a secondary source and not discovering the latest position in the legal system borrowed from. In one case a decision of the Australian High Court was used to support a finding that if a passenger was injured when being driven by someone whom he or she knew did not have a licence there could be no award of damages. By the time of the Scottish decision the Australian Court had, some years, before not followed its earlier decision and had developed a more subtle approach involving consideration of community acceptability, which has since been followed in Scotland.

## **Law Reform and Political Autonomy**

Attempts to discuss the developing relationship between the civilian tradition and the English law tradition miss a large part of the reality of law in today's world if they do not consider what has occurred as a result of conscious law reform. As far as Scotland and England and Wales (separately from Scotland) are concerned, very large areas of private and commercial law have in the last forty years been created by legislation promoted by permanent law reform bodies (the Law Commission of England and Wales and the Scottish Law Commission). In Scotland it looks as though the establishment two years ago of the new constitutional arrangements whereby there is an autonomous Scottish Parliament, with power to legislate for all of private law, and large parts of commercial law,<sup>16</sup> can be seen as giving a boost to this. It's first major piece of legislation<sup>17</sup> was a completely new comprehensive code dealing with decision making for adults with partially diminished or complete lack of capacity to make decisions, that had been promoted by the Scottish Law Commission. It is currently engaged on what will be a completely new code of land law, again based on detailed work of

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<sup>16</sup> The major exception is company law. But that anyhow is increasingly driven by European Union legislation.

<sup>17</sup> Adults with Incapacity (Scotland) Act 2000.

the Scottish Law Commission over very many years. Law reform coming from other quarters has also been facilitated. The most notable example is a bill before the Scottish Parliament to recast completely the law relating to Mental Health<sup>18</sup>

Even before the Parliament was created conscious law reform proposals, resulting in legislation over the last forty years have produced a distinctive, but also completely new set of rules for Scotland in, to mention only the most prominent areas: bankruptcy, the enforcement of debts against debtors' assets, family Law, and prescription of obligations. Fully to understand what might be the nature of convergence and divergence between the civilian and the English tradition, does entail considering this sort of new law, which is in fact extremely central to the experience of most, if not quite all,<sup>19</sup> legal systems in the western world today. It promotes convergence by two routes: firstly, law reform bodies for much of the time work by identifying "problem" and proposing "solutions". That fits naturally into one particular approach to doing comparative law, in

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<sup>18</sup> Following the recommendations of a committee set up by the Scottish Executive to consider the field.

<sup>19</sup> Even Germany has now finally achieved a reform of aspects of Schuldrecht.



which the rules of other legal systems are then searched as ways of providing the optimum solution to problems. It is much less common in this sort of work to look for underlying conceptual structures. One possible example where that might have happened was if the Scottish Law Commission had, as a few years ago it looked as though it wished to, undertaken a complete reworking of the law of unjustified enrichment for Scotland. The second respect in which the work of Law Reform bodies is important for understanding the way convergence does and does not take place is that much of this sort of law is completely independent invention. For example, the form of security that has to be adopted for securing a loan over immoveable property in Scotland is a statutory creation from the early 1970s that bears no relationship to the previous modes of constituting security over immoveables. It has, incidentally, given rise to some litigation as to just what rights and duties it creates. Prominently, the system of bankruptcy for individuals and partnerships, which in its modern form dates from 1985<sup>20</sup> is in important respects a completely new system using ideas, e.g. in determining the range

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<sup>20</sup> Bankruptcy (Scotland) Act 1985.

of alienations prior to insolvency that can be challenged that draws on no other tradition, and only to a limited extent on earlier Scottish tradition.

### **The Effect of the development of Law defined by context**

There have always been recognised areas of law that are defined not by reference to their legal rules but by a context. Banking Law, and also Labour Law are, for instance, terms that have now a long history. However, there is a development taking place where new areas are beginning to become prominent where the context is the defining idea. One of these at least is global; the law of internet and telecommunications law as well. Another is global in a different way, because the context is one of potentially global and certainly transnational effect, Environmental Law. Another, which is more nationally based but has transnational dimensions, is Media Law. Another, which is not transnational in its effect, but is in the technology that underlies at least large projects, is the law of the building industry,

Construction Law.<sup>21</sup> All these areas in different ways, are already I believe promoting some convergence between civilian and common law traditions. Scotland is a fruitful vantage point from which to observe the process taking place. In many of these areas the question of convergence will increasingly show itself through legislation. This has already happened for instance on a UK basis in the construction industry where legislation in 1996<sup>22</sup> introduced a new type of mandatory mechanism<sup>23</sup> for resolving disputes of the type that occur often during the performance of construction contracts, for example, disputes between sub-contractors and main contracts, about when the sub-contractor is entitled to be paid. Environmental law is increasingly based on legislation, much of it reflecting international conventions. Human Rights law increasingly dominates Media Law. Scotland, as already noted above, shows that there may be room for genuine development, for example in privacy, and the law of contempt of court from background of being a mixed jurisdiction.

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<sup>21</sup> For a discussion the wider European (including UK) context See C. E. C. Jensen, *Towards a European Building Contract Law* (1999).

<sup>22</sup> Housing Grants Construction and Regeneration Act 1996.

<sup>23</sup> Called, "adjudication".

## **Civilian Systems Rediscover their solutions through Scotland**

I have tried to be careful not to suggest that a mixed legal system in the form that the Scottish one has is by definition the model for the future in Europe or the world more widely. But there are aspects of the current experience in Scotland that can be pointed to as some sort of inspiration that fits the philosophy of the Hansa law School. They are:

- Being open to other lawyers' approach to legal questions
- Seeking to think from first principles in addressing a situation requiring a legal solution
- Not being frightened by terminology of another system

- Being careful to go beneath the surface to see that sometimes there really is a major difference of thinking and/or approach
- Having a confidence that small legal systems may have things to offer that are at least as fruitful as those of large legal systems
- Being aware that the experience of becoming a mixed legal system is diverse, complex and can be difficult

Two examples may be used from recent Scottish experience to illustrate all of these points. The recent final publication of the *Principles of European Contract Law*<sup>24</sup> in many respects happen to reflect the structure of the Scottish law of contract, in particular its approach to contract breach, based on a recognition of the principle of mutuality and treating the right to performance as being primary and its approach to contract formation based on objective assessment of consensus with a defined role for unilateral

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<sup>24</sup> Prepared by the Commission of European Contract Law, Chairman Professor Ole Lando, (Ole Lando and Hugh Beale (eds) Parts I and II (2000).

promises and third party rights. Work by a number of academic authors<sup>25</sup> has shown that Scotland has a series of principles underlying a law of trusts, which do not rely on nor need English equity jurisprudence, and which can be adapted to the experience of European jurisdictions which do not on the face of them have a unified law of trusts. The structure is remarkably simple, based on a concept of the trustee(s) having a split personality, and the beneficiaries having a complex of personal rights against the trustees, with the split personality meaning that these do not run the risk of being nullified in practice by the bankruptcy of the trustee(s). There is controversy as to just exactly what the correct juristic basis for analysing the split personality of the trustee is. The dominant view is based on the civilian idea of distinct patrimonies (French = patrimoine); others have suggested that some sort of distinct status relationship exists.

## **A Final Warning**

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<sup>25</sup> Especially George Gretton, Edinburgh University. The literature is now growing with also contributions by K G Reid, S Wortley, N Whitty, J W G Blackie and others.

There is at least one danger apparent from Scottish experience of drawing on different legal traditions. It is probably enough to just be aware of it, so as not to end on a too negative note. The danger is getting lost. The law of delict in Scotland can be criticised on this basis. The Law of negligence is in essence a UK developed area of law that is entirely case law based, and now drawing heavily on influence from British Commonwealth jurisdictions, even though in some respects, such as the liability of public authorities, e.g. for negligent environmental planning decisions, there is divergence on the part of Canada and New Zealand. But the rest of the law of delict in Scotland lacks any proper structure. Sometimes it can be shown to be because of a failure to grapple with the big questions simply because it does not know where it stands on them. One example is where a government official does something intentionally knowing that it will cause a detriment to a member of the public, and it is some way ``illegal''. When some fifteen years ago a charterer of an oil tanker alleged that the public officer who controlled the harbour at Sullom Voe in Shetland had intentionally refused the ship

entry without legal ground,<sup>26</sup> the Scottish Court looked at a Scottish textbook that happened to mention that England there was something called the ``tort of misfeasance in a public office'', and on the back of that raided some English case law, and said the English rules would apply. That required that there was shown to be some actual personal spite motivation the public officer's actions. The trouble for Scots law is that it leaves the rest of the law of intentional delict lacking any structure, without having noticed that in England they have many other torts dealing with specific sorts of intentional tort, and do not so obviously need a general structure for that area of law.

All good things have risks and dangers in them. That is no reason for not involving oneself in the whole heartedly.

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<sup>26</sup> *Micosta SA.v Shetlands Islands Council (The Mihalis)* 1986 SLT 193.